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The Application of California Riparian Water Rights Doctrine to Federal Lands in the Mono Lake Basin

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Riparian water rights in California entitle owners of land bordering a stream to receive the natural flow of the stream undiminished except by the common right of all to receive a reasonable share of the water.[1] According to the California courts, however, riparian water rights do not extend to lands owned by the federal government.[2] The soundness of this position is currently being questioned.

Sierra Club v. United States[3], a case arising out of the controversy at Mono Lake, California,[4] presents the question of whether the federal government, as owner of the majority of lands bordering Mono Lake, can assert a riparian right.[5] In *Sierra Club*, the Sierra Club and the

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1. *See* D. ANDERSON, RIPARIAN WATER RIGHTS IN CALIFORNIA, BACKGROUND AND ISSUES 30 (Governor's Commission to Review California Water Rights Law, Staff Paper No. 4, 1977); *see also* W. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS, 183-84 (1956).

The riparian rights doctrine and the prior appropriation doctrine are the two primary water rights doctrines in California. D. ANDERSON, *supra*, at 40-41. A riparian right accords to the owner of land bordering a watercourse a right to the use of the water *on such land* for reasonable and beneficial uses. *Id.* A watercourse refers to waters flowing in a definite channel with bed and banks or sides, and includes lakes. *Id.* at 21, 25.

The prior appropriation doctrine provides that a person who first diverts or appropriates water of a watercourse and puts it to a reasonable and beneficial use has a right to use such water; this right is superior to the rights of later appropriators. *Id.* at 40. An appropriative use of water is *not* limited to lands bordering the water course as is the case with a riparian use. *Id.* California water rights doctrine is discussed in more detail *infra* notes 53-92 & accompanying text.

2. *See* McKinley Bros. v. McCauley, 215 Cal. 229, 231, 9 P.2d 298, 299 (1932); *see also* W. HUTCHINS, *supra* note 1, at 56.

3. Civ. No. S-80-282-LKK (E.D. Cal. filed Apr. 17, 1980). The case is currently before Judge Lawrence K. Karlton of the United States District Court for the Eastern District of California.

4. The essence of the controversy is that the natural resources of the Mono Basin are being threatened as a result of the declining level of Mono Lake. Most of the lowering of the level of the lake can be attributed to the diversion of water by the City of Los Angeles from the streams flowing into Mono Lake. *See* CAL. DEPT. OF WATER RESOURCES, REPORT OF THE INTERAGENCY TASK FORCE ON MONO LAKE 1 (Dec. 1979) [hereinafter cited as INTERAGENCY REPORT]. The situation at Mono Lake is discussed in more detail *infra* notes 136-48 & accompanying text.

5. Complaint at 8-9, Sierra Club v. United States, Civ. No. S-80-282-LKK (E.D. Cal. filed Apr. 17, 1980).

In recent litigation between the State of California and the United States government, in federal district court, the federal government has been adjudged owner of the relicted lands at Mono Lake. Relicted lands are those lands exposed as the lake level drops. *See*

Natural Resources Defense Council have brought suit against the United States alleging that the federal government has a duty to assert its riparian water rights at Mono Lake to prevent further diversions of water out of the basin by the City of Los Angeles.[6] The plaintiffs argue that when the federal government withdrew its lands in the Mono Basin from the public domain[7] the withdrawal vested riparian water rights in the United States.[8] The case law in California, although consistently holding that riparian rights do not attach to federal lands, fails to distinguish between public domain lands and withdrawn or reserved lands.[9] The issue presented by this Comment is whether the federal

California *ex rel.* State Lands Comm'n v. United States, Civ. No. S-80-696-LKK (E.D. Cal. filed Aug. 19, 1980).

6. Complaint at 9, 12, Sierra Club v. United States, Civ. No. S-80-282-LKK (E.D. Cal. filed Apr. 17, 1980).

7. The lands owned by the federal government are generally, and for purposes of this Comment, classified as four types: 1) public domain, 2) reserved lands or reservations, 3) withdrawn lands or withdrawals, and 4) acquired lands. *See* ONE THIRD OF THE NATION'S LAND, A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMM'N 19-22 (1970) [hereinafter cited as PLLRC REPORT].

Public domain lands are lands open to settlement, sale or disposition under the public land laws and not withdrawn or reserved for any governmental purpose. 63 AM. JUR. 2d *Public Lands* § 1 (1972). *See also* Federal Power Comm'n v. Oregon, 349 U.S. 435, 443-44 (1955); Kindred v. Union Pac., 225 U.S. 582, 596 (1912). Public land laws are statutes providing for the sale, grant or other disposition of public domain lands. *See, e.g.*, the Homestead Act of 1891, 43 U.S.C. §§ 161-277 (1976).

Reserved lands are lands removed from the public domain and immediately designated to some predetermined purpose. C. WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS at A-1 (1969) (prepared for the Public Land Law Review Comm'n). *See also* L. MALL, PUBLIC LAND AND MINING LAW 120 (1981). Reservations include national parks, national forests, Indian reservations, and military reservations. *See id.* at 107-10, 121. Withdrawn lands are lands removed from the public domain for the purpose of maintaining the status quo while the ultimate disposition of the land is being determined by Congress or the Executive. C. WHEATLEY, *supra*, at A-2. For a good discussion of reservations and withdrawals and examples thereof, see L. MALL, *supra*, at 107-43.

A withdrawal is broader than a reservation and, in effect, embraces both a withdrawal and a reservation. C. WHEATLEY, *supra*, at A-1. As a general rule, lands which have been withdrawn from the public domain are no longer subject to the public land laws. *See* L. MALL, *supra*, at 120. Acquired lands are federally owned lands which were acquired from nonfederal owners by purchase, condemnation, gift or exchange. *See* PLLRC REPORT, *supra*, at 20. "In the present nomenclature of the public land laws . . . the terms withdrawal and reservation are used interchangeably. In the nineteenth century, however, when the terms first came into use distinct meanings were attributable to each term. Thus, a complete understanding of sources of authority for the present day system of withdrawals and reservations of public lands . . . requires on understanding of the separate historical meanings of each term." C. WHEATLEY, *supra*, at A-1.

8. *See* Exhibit "A" to Complaint at 9, Sierra Club v. United States, Civ. No. S-80-282-LKK (E.D. Cal. filed Apr. 17, 1980).

9. *See, e.g.,* McKinley Bros. v. McCauley, 215 Cal. 229, 231, 9 P.2d 298, 299 (1932); Rindge v. Crags Land Co., 56 Cal. App. 247, 251-52 (1922). Reserved lands are defined *supra* note 7.

government can assert riparian water rights under California law in federally owned lands that have been removed from the public domain.[10]

This Comment does not address *National Audubon Society v. Superior Court*,[11] in which the California Supreme Court held that the trial court considering the allocation of water resources in the Mono Lake Basin must apply the public trust doctrine. *Sierra Club* is concerned only with determining the water rights of the federal government in the Mono Lake Basin and does not raise the public trust issue. A final determination in the *National Audubon Society* litigation will not resolve the issues in *Sierra Club*, and the two actions must be kept separate for purposes of the present analysis.[12]

This Comment first outlines the background of water rights on federal lands. Because the federal government has acquiesced in the

10. It has been suggested that *federal* riparian rights exist as a legal basis for water rights under federal law. *See* Kiechel & Green, *Riparian Rights Revisited: Legal Basis for Federal Instream Flow Rights*, 16 NAT. RESOURCES J. 969 (1976). This Comment, however, focuses on riparian rights held by the federal government under *California* law.

11. 33 Cal. 3d 419, — P.2d —, — Cal. Rptr. — (1983). In *National Audubon Society* the Court held that the public trust doctrine and the appropriative water rights system are parts of an integrated system of water law and both must be considered in the planning and allocation of water resources. *Id.* at 452, — P.2d at —, — Cal. Rptr. at —. More significantly, the court also held that the public trust imposes a duty of *continuing* supervision over water appropriations. *Id.* at 444, 446-67, — P.2d at —, — Cal. Rptr. at — (emphasis added). Hence, the state has the power to reconsider allocation decisions in light of the public trust doctrine. *Id.* at 447, — P.2d at —, — Cal. Rptr. at —. Thus, the federal district court, sitting as the trial court in the underlying action, *id.* at 425, — P.2d at —, — Cal. Rptr. at —, will now apply the public trust doctrine in a reconsideration of the allocation of water resources in the Mono Lake Basin to determine whether the present level of diversion impairs the public trust.

The public trust doctrine, in brief, provides that the state owns all navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people. *Id.* at 434, — P.2d at —, — Cal. Rptr. at —. For a more extensive discussion of the California public trust doctrine, see *id.* at 433-41, — P.2d at —, — Cal. Rptr. at —; Comment, *The Public Trust Doctrine and California Water Law: National Audubon Society v. Department of Water and Power*, 33 HASTINGS L.J. 653, 656-69 (1982).

12. The district court could conclude in *National Audubon Society* that Los Angeles' present level of diversion is in furtherance of the public trust. Such a conclusion, however, would not resolve the issue of whether the United States possesses riparian water rights in the Mono Lake Basin. If the district court concludes that the public trust doctrine requires lowering the level of diversion, the court in essence will be required to balance the environmental needs of the Mono Lake Basin with Los Angeles' need for domestic water from the Basin. In the latter case, *Sierra Club* would still not be mooted: uses protected by the public trust are not necessarily equivalent with riparian uses of water. If riparian water rights were to be established in favor of the federal government, then those rights would also have to be considered by the court. In any event, the present analysis applies to all situations in which the United States owns riparian land in California that has been withdrawn from the public domain.

Both *National Audubon Society* and *Sierra Club* are pending before Judge L.K. Karlton of the United States District Court for the Eastern District of California.

states' right to control water use, it is also necessary to review California water rights doctrine. The Comment then analyzes the California cases that hold that no riparian rights attach to federal lands. It is shown that the basis for these holdings is a series of nineteenth century acts of Congress. The Comment argues that the effect of removing lands from the public domain, however, is to remove those lands from the operation of the acts. The Comment concludes, therefore, that the holding of the California cases that riparian rights do not attach to federal lands is limited to public domain lands, and that the federal government can assert riparian water rights on lands removed from the public domain. Finally, this analysis is applied to the withdrawn lands at Mono Lake to demonstrate how an assertion of riparian rights by the federal government could prevent or limit further diversions of water out of Mono Lake Basin.

History and Background of Water Rights on Federal Lands in California

Development of Water Rights on Federal Lands

The vast majority of western lands, including their waters and other natural resources, were originally acquired by the federal government when the United States assumed sovereign title by treaty with, or purchase from, previous sovereigns.[13] The common law rule concerning water rights on federal lands, followed by the United States government, was that "every riparian owner was entitled to the continued natural flow of the stream."[14] As states were formed out of the western territories, the states acquired, as an incident of sovereignty, the power to change the common law rule of riparianism,[15] subject, however, to two important limitations.

First, absent specific authority from Congress, a state could not

13. 2 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 15 (1974). California was acquired from Mexico in 1848 by the Treaty of Guadalupe Hidalgo. All the lands in California, with the exception of prior Spanish and Mexican land grants, became a part of the public domain lands. L. MALL, *supra* note 7, at 6.

14. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702 (1899). The common law rule as stated in this case is the predecessor of the modern riparian doctrine. This rule provided that a riparian owner had the right to have water flow past his or her property undiminished in quantity or quality by upstream users. *Id.*

15. *Id.* at 703. After the American Revolution the original 13 colonies became sovereign states and, in that character, held the absolute right to all their navigable water for their own use, subject only to the rights "surrendered by the Constitution to the general government." Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842). As new states were admitted into the Union, on an equal footing with the original states, they succeeded to all the rights of sovereignty of the original states, including the right to control water, except in so far as this right was diminished by the public lands remaining in the possession and under the control of the United States. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223 (1845).

"by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property."[16] Thus, states had no power to abrogate the riparian rights of the federal government without congressional consent. This limitation reflected the early rule that riparian rights did attach to federal land. The rule was soon changed, when in recognition of local control over water use, Congress consented to state regulation of water use in derogation of the riparian rights of the federal government.[17]

Second, a state's power to change the common law rule of riparianism was "limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."[18] This limitation, referred to as navigational servitude,[19] reflects the ultimate power vested in the federal government by the United States Constitution to control interstate commerce and preserve navigable watercourses.[20]

Local control over water use developed during the California Gold Rush when miners on federal lands in the West required water to work their claims.[21] Initially, there was no organized government in the California mining areas and no regulation of water use. Without regulation, the miners simply used such water as they required by diverting it out of the natural watercourses.[22] Eventually, the miners developed a custom of "first in time, first in right" or "prior appropriation" to determine priority of rights to the waters they diverted.[23]

While miners were developing customs and local laws to regulate water appropriation on the federal lands in the West, the federal government did not assert its water rights as owner of these lands.[24] Possessory titles to water use were upheld by the courts during this period of silent acquiesence on the assumption that congressional silence indi-

16. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).

17. *See infra* notes 22-28 & accompanying text. As discussed later, the consent of Congress is not applicable to all types of federal lands. *See infra* notes 41-48 & accompanying text.

18. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. at 703.

19. This limitation on the states' regulation of water resources is still important today. *See* Kaiser Aetna v. United States, 444 U.S. 164, 170-74 (1979).

20. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. at 703. This Comment, however, does not focus on the federal government's power over interstate commerce or navigable waterways. Instead, the focus is on the rights of the federal government as a landowner in California.

21. 1 W. HUTCHINS, *supra* note 13, at 164.

22. *Id.*

23. *See* W. HUTCHINS, *supra* note 1, at 41-43.

24. *Id.* at 42.

cated tacit consent.[25]

In order to validate the doctrine of prior appropriation, Congress passed a series of statutes whereby it formally acquiesced in local control over water use.[26] By the Acts of 1866 and 1870 and the Desert Land Act of 1877, Congress granted authority to the states to control the use of water on federal lands in contravention of the common law rule and confirmed the validity of water rights acquired under the prior appropriation doctrine.[27]

The Act of 1866 primarily governed the mining of gold, silver, and other hard minerals on public domain lands.[28] Section 9 of this Act, however, specifically provided for the protection of water rights on the public domain which rights were acquired by the diversion of water from the natural watercourse and were recognized and acknowledged by local customs, laws, and decisions.[29] In 1870, the Act of 1866 was amended to provide that after 1870 all patents issued or preemption or homestead rights allowed should be subject to the vested water rights recognized by the 1866 Act.[30]

25. 1 W. HUTCHINS, *supra* note 13, at 177. *See, e.g.*, Forbes v. Gracey, 94 U.S. 762, 766-67 (1877).

26. W. HUTCHINS, *supra* note 1, at 56. The statutes passed by Congress are: Act of July 26, 1866, ch. 262, 14 Stat. 253 (1866) (codified with some differences in language at 43 U.S.C. § 661 & 30 U.S.C. § 51 (1976)) [hereinafter cited as Act of 1866]; Act of July 9, 1870, ch. 235, 16 Stat. 218 (1870) (codified with some differences in language at 43 U.S.C. § 661 & 30 U.S.C. § 52 (1976)) [hereinafter cited as Act of 1870]; and the Desert Land Act of March 3, 1877, ch. 107, 19 Stat. 377 (1877) (codified with some differences in language at 43 U.S.C. § 321 (1976)) [hereinafter cited as Act of 1877]. *See also* C. WHEATLEY, STUDY OF THE DEVELOPMENT, MANAGEMENT, AND USE OF WATER RESOURCES ON THE PUBLIC LANDS 153-70 (1969) (summary and legal study prepared for the Public Land Law Review Comm'n); Little, *Administration of Federal Non-Indian Water Rights*, 27B ROCKY MTN. MIN. L. INST. 1709, 1715-18 (1982).

27. *See* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. at 704-06. *See also* Little, *supra* note 26, at 1716-17.

28. *See* L. MALL, *supra* note 7, at 171.

29. Act of 1866, *supra* note 26. Section 9 provides:

> [W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed. *Provided, however*, whenever . . . any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

43 U.S.C. § 661 (1976) (emphasis in original).

30. Act of 1870, *supra* note 26. Section 17 provides in relevant part: "[A]ll patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized [by this section]." 43 U.S.C. § 661 (1976).

The Desert Land Act of 1877 had the primary objective of providing for reclamation of arid lands on the public domain in the western states and territories, including California.[31] The Act specifically stated that water rights depended upon bona fide prior appropriation, and that surplus water over and above actual prior appropriation and use should be free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights.[32]

The full effect of the Acts of 1866, 1870, and 1877 on western water law was not apparent until 1935 when the United States Supreme Court decided *California Oregon Power Co. v. Beaver Portland Cement Co.*[33] In *California Oregon Power*, a riparian owner in Oregon sought to enjoin changes in the bed of the stream flowing past its land and any further lessening of the stream flow.[34] The riparian owner's lands were originally acquired from the federal government by patent.[35] The issue before the Court was whether a patent of land from the United States carried with it a common law riparian water right.[36]

In its analysis, the Court considered whether the three congressional acts entirely abandoned the common law rule of riparianism as it applied to public lands and subsequent grantees of the land.[37] The Court focused on the Desert Land Act of 1877, and construed it as affecting "a severance of all waters upon the public domain, not theretofore appropriated, from the land itself."[38] The Court stated that "a patent issued thereafter for lands in a desert-land state or territory . . . carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed."[39] The Supreme Court concluded that "following the act of 1877, if not before,

31. *See* L. MALL, *supra* note 7, at 70.

32. Act of 1877, *supra* note 26. Section 1 of the Act provides in relevant part:

> *Provided, however*, that the right to the use of water by the person so conducting the same [reclamation of desert lands], on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all suplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

43 U.S.C. § 321 (1976) (emphasis in original).

33. 295 U.S. 142 (1935).

34. *Id.* at 150-51.

35. *Id.* at 151. "A land patent is a muniment of title issued by a government or state for the conveyance of some portion of the public domain." BLACK'S LAW DICTIONARY 1013 (rev. 5th ed. 1979).

36. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. at 153-54.

37. *Id.* at 155-56.

38. *Id.* at 158.

39. *Id.*

all non-navigable waters then a part of the public domain became *public juris*, subject to the plenary control of the designated states . . ."[40] The practical effect of *California Oregon Power* was to defer to state regulation of water use and to permit each state "to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."[41]

In *California Oregon Power*, the Supreme Court concluded that since the Acts of 1866, 1870, and 1877 severed the water from the federal lands, Congress had thereby abandoned the common law riparian doctrine.[42] After *California Oregon Power*, therefore, it seemed that any water rights held by the federal government had to be acquired, if at all, pursuant to state law.[43] The important unresolved question was whether the rule from *California Oregon Power* applied to federal lands removed from the public domain.[44]

The scope and applicability of the Acts of 1866, 1870, and 1877 were clarified by the United States Supreme Court in the 1955 case of *Federal Power Commission v. Oregon (Pelton Dam)*.[45] In this case the Court upheld, under the property clause of the Constitution,[46] the authority of the Federal Power Commission to license construction of a private hydroelectric project on reserved lands in Oregon in disregard of state water law.[47] In so holding, the Court expanded the federal reserved water rights doctrine that provides for water rights on federal

40. *Id.* at 163-64.

41. *Id.* at 164. For a good discussion of *California Oregon Power*, see C. WHEATLEY, *supra* note 26, at 184-88.

42. *See supra* text accompanying notes 33-36. In 1898, the Supreme Court held that the acts in question were Congressional recognition of the prior appropriation doctrine in contravention of the common law riparian rights doctrine. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 706 (1899). In *California Oregon Power*, the Court did not rely on the "consent of Congress" theory, but instead, adopted a theory that the subject acts affected a severance of waters from the public domain thereby allowing the states to control water.

43. In Winters v. United States, 207 U.S. 564 (1907), the federal reserved water rights on Indian reservations were held to be superior to water rights vesting after the date of the creation of the reservation. *Id.* at 575-77. From 1935, the date of *California Oregon Power*, to 1955, the date of Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955), *see infra* notes 41-48 & accompanying text, the *Winters* doctrine operated as an exception to the general rule regarding deference to state water law. *See also* Little, *supra* note 26, at 1733; F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 105 (National Water Comm'n Legal Study No. 5, Final Report, 1971).

44. The various types of federal lands are defined *supra* note 7.

45. 349 U.S. 435 (1955). Commentators have regularly referred to this case as *Pelton Dam* in recognition of the dam in Oregon which was the subject of controversy. *See, e.g.*, Little, *supra* note 26, at 1733-35.

46. U.S. CONST. art IV, § 3, cl. 2: "The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States."

47. Federal Power Comm'n v. Oregon, 349 U.S. at 442-44.

reserved lands[48] under federal law without compliance with or recognition of, state law.[49]

One of the issues before the Court in *Pelton Dam* was whether the statutes in question were applicable to reserved lands.[50] The Court held that the Acts of 1866, 1870, and 1877 applied only to "public lands" and not to "reserved lands":

> The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of possessory rights *on public lands* asserted under local laws and customs . . . .
> . . . [T]hese Acts are not applicable to the reserved lands and waters here involved . . . . The lands before us in this case are not 'public lands' but 'reservation.' Even without that express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved lands.[51]

The holdings of *Pelton Dam* and *California Oregon Power* were significant because deference to state water law on federal lands is limited to lands to which the Acts apply; therefore, on reserved lands the United States can acquire federal reserved water rights in disregard of state law.[52]

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48. *See supra* note 7 for a definition of reserved lands.

49. *See* F. TRELEASE, *supra* note 43, at 105-07. Reserved rights are a species of of water rights under *federal* law. The reserved water rights doctrine has been best described as follows: "[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." Cappaert v. United States, 426 U.S. 128, 138 (1976). The United States Supreme Court has severely limited the applicability of the reserved rights doctrine in favor of state control of water. United States v. New Mexico, 438 U.S. 696 (1978). For a discussion, see Elliot, *United States v. New Mexico: Purposes That Hold No Water*, 22 ARIZ. L. REV. 19 (1980); Note, *United States v. New Mexico: The Beginning of a Trend Toward Favoring State Water Rights Over Federal Water Rights*, 9 N.M.L. REV. 361 (1979). Federal reserved rights are not the subject of this Comment and therefore will not be discussed extensively. For a good general discussion and criticism of the reserved rights doctrine, see F. TRELEASE, *supra* note 43, at 104-16.

Recently, there has been discussion of a non-reserved water right under federal law, separate and distinct from the reserved rights doctrine. *See* Memorandum to Carol E. Dinkins, Assistant U.S. Attorney General, Land and Natural Resources Division, from Theodore B. Olsen, Assistant U.S. Attorney General, Office of Legal Counsel (June 16, 1982) (discussing federal "non-reserved" water rights) (on file with HASTINGS LAW JOURNAL).

50. Federal Power Comm'n v. Oregon, 349 U.S. at 446-48.

51. *Id.* at 447-48 (emphasis in original). For an interesting discussion of *Pelton Dam*, see C. WHEATLEY, *supra* note 26, at 106-12.

52. In *Pelton Dam*, the Court upheld water rights under federal law in complete disregard of the water law of Oregon. 349 U.S. at 442-44. Although many bills have been introduced in Congress which would have the effect of reversing *Pelton Dam*, none has passed. *See* Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation"*, 20 RUTGERS L. REV. 423 (1966); F.TRELEASE, *supra* note 43, at 130-33. In 1975, the Supreme Court relied upon and affirmed the *Pelton Dam* finding of non-applicability of the Desert Land Act of 1877 to reserved lands. Cappaert v. United States, 426

There are two important conclusions to be drawn from the Supreme Court's interpretation of the Acts of 1866, 1870, and 1877: 1) the federal government has consented to state control of water on federal lands and any water rights acquired after the Desert Land Act of 1877, except federal reserved rights,[53] must be acquired pursuant to state law;[54] and 2) the Acts of 1866, 1870, and 1877[55] are not applicable to reserved lands.[56]

California Water Rights Law

Since the federal government has consented to state control of water rights, state law on the subject is important to any discussion of water rights other than the federal reserved rights doctrine. The two state water law doctrines in California governing both federal- and state-related claims to water are the prior appropriation doctrine and the riparian doctrine.[57] As previously explained, the prior appropriation doctrine developed during the California Gold Rush.[58] In *Irwin v. Phillips*,[59] decided in 1855, the California Supreme Court approved the mining custom of "first in time, first in right" and thereby validated the prior appropriation doctrine.[60] The court was faced with the question of whether a miner in California had the right to divert water of a stream from its natural watercourse.[61] In *Irwin*, the claims of an appropriator were challenged by a miner who, *subsequent* to the appropriation, settled on public lands along the banks of the same stream and asserted a common law riparian right to the full flow of the stream.[62] The court decided the case according to the prior appropriation doctrine and held that the miner who first diverted water from its natural watercourse had a right to use such water which was superior to that of all subsequent appropriators.[63] It was not necessary for the court to decide the question of competing riparian and appropriative rights, be-

U.S. 128, 145 (1975). The *Cappaert* Court did not reach the issue of the applicability of the Acts of 1866 and 1870. *Id.*

53. *See supra* note 49.
54. *See supra* notes 33-43 & accompanying text.
55. *See supra* note 26.
56. *See supra* notes 50-52 & accompanying text.
57. W. HUTCHINS, *supra* note 1, at 40.
58. *See supra* notes 21-23 & accompanying text.
59. 5 Cal. 140 (1855).
60. *Id.* at 146-47.
61. *Id.* at 145.
62. *Id.*
63. *Id.* at 146-47. In 1872, the California Legislature enacted Civil Code §§ 1410-1422, codifying the prior appropriation doctrine. Act of March 27, 1872, 1871-72 Cal. Stat. ch. 474, at 622. *See also* M. ARCHIBALD, APPROPRIATIVE WATER RIGHTS IN CALIFORNIA: BACKGROUND AND ISSUES 5 (Governor's Comm'n to Review Water Rights Law, Staff Paper No. 1, 1977).

cause the miner who claimed as a riparian lacked the ownership of land along the stream which was necessary to assert a riparian right.[64]

The prior appropriation doctrine provides that the person who first diverts water from its natural watercourse and puts it to a reasonable and beneficial use has a right to use such water which is superior to the right of later appropriators.[65] The reasonable and beneficial use doctrine requires that water be used in a reasonable manner as compared with other uses on the same watercourse, and that the use be for some beneficial purpose.[66] In addition to the reasonable and beneficial use requirement, a valid appropriation requires that the appropriator strictly follow all statutory requirements for permit application, notice, environmental quality, due diligence in actually applying the water use, and other considerations.[67]

In 1886, however, the California Supreme Court held in *Lux v. Haggin*[68] that the riparian rights doctrine had been adopted by California when it adopted the common law of England.[69] Briefly stated, the riparian water rights doctrine accords to the owner of land bordering a watercourse a right to use of the water on such land.[70] The use of water is limited to the riparian land[71] and, as a result of a 1928 amendment to the California Constitution, must be exercised in a reasonable and beneficial manner.[72] Since a riparian right is not created by use, in the absence of prescription, it is not lost by disuse.[73] A riparian's right to use water is shared equally and correlatively with other riparian owners on the same watercourse.[74] By thus recognizing the riparian rights

64. Irwin v. Phillips, 5 Cal. at 145-46.

65. W. HUTCHINS, *supra* note 1, at 40. *See also* M. ARCHIBALD, *supra* note 63, at 2.

66. *See infra* notes 78-79 & accompanying text.

67. The statutory mechanics of acquiring water rights by prior appropriation are outlined in M. ARCHIBALD, *supra* note 63, at 15-31.

68. 69 Cal. 255, 10 P. 674 (1886).

69. *Id.* at 379-87, 10 P. at 746-51. *See also* W. HUTCHINS, *supra* note 1, at 52.

70. W. HUTCHINS, *supra* note 1, at 40.

71. Riparian land is generally the tract of land contiguous to a watercourse under single ownership. *See* D.ANDERSON, *supra* note 1, at 22. California follows the "source of title" rule under which riparian land is defined as the smallest parcel held under one title in the chain of title leading to the present owner. *Id.* at 22-23.

72. CAL. CONST. art. X, § 2 (1976) (formerly CAL. CONST. of 1879, art. XIV, § 3 (1928)). *See infra* notes 78-79 & accompanying text. In contrast to the riparian right, an appropriative right is not limited to use on riparian land. W. HUTCHINS, *supra* note 1, at 40.

73. *See* Peak v. Harris, 48 Cal. App. 363, 381, 192 P. 310, 318 (1920); *see also* D. ANDERSON, *supra* note 1, at 2. A prescriptive right to water can develop by an adverse use of the requisite character over the period of the statute of limitations. *See* W. HUTCHINS, *supra* note 1, at 298-301.

74. *See* Prather v. Hoberg, 24 Cal. 2d 549, 560, 150 P.2d 405, 411 (1944); *see also* W. HUTCHINS, *supra* note 1, at 40. A riparian has no right to a fixed quantity of water as against other riparians, but rather has a right to use of the water in common with the rights of other riparians. D. ANDERSON, *supra* note 1, at 2. In times of water shortage, on a partic-

doctrine, the Supreme Court in *Lux v. Haggin* established a dual system of water rights in California, with the prior appropriation doctrine coexisting with the riparian doctrine.[75]

After *Lux v. Haggin*, and before the establishment of the reasonable and beneficial use doctrine in 1928, a riparian could use water for any use beneficial to the riparian land, and there was no requirement in the law that a riparian's use be reasonable, as against a junior appropriator.[76] A riparian whose water rights were adjudged superior to a competing appropriator's was, therefore, entitled to the full flow of the stream without regard to the needs of the appropriator.[77]

In 1928, California water rights law was drastically altered when the California Constitution was amended to prohibit the waste of water and to limit all water use (appropriative and riparian) to reasonable and beneficial uses.[78] A major effect of the 1928 amendment was to

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ular stream, no one riparian right is superior—all riparians share proportionately in the decreased flow. *See* W. HUTCHINS, *supra* note 1, at 40-41.

75. *See* M. ARCHIBALD, *supra* note 63, at 4-5; *see also* W. HUTCHINS, *supra* note 1, at 40.

76. *See* Mentone Irrigation Co. v. Redlands Elec. Light & Power Co., 155 Cal. 323, 327, 100 P. 1082, 1083 (1909).

77. *See* Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 100-01, 252 P. 607, 615 (1926). In *Herminghaus* the court held that:

> The doctrine that a riparian owner is limited to a reasonable use of the water applies only as between different riparian proprietors. As against an appropriator who seeks to divert water to nonriparian lands, the riparian owner is entitled to restrain any diversion which will deprive him of the customary flow of water which is or may be beneficial to his land. He is not limited by and measure of reasonableness.

Id.

In Pabst v. Finmand, 190 Cal. 124, 211 P. 11 (1922), the court stated: "Obviously, there is no question of reasonable use in the sense in which that term is applied to the rights of respective riparian owners since a riparian owner, as against a nonriparian owner, is entitled to the full flow of the stream without the slightest diminution." *Id.* at 132, 211 P.2d at 14. *See also* Miller & Lux v. Madera Canal & Irrigation Co., 155 Cal. 59, 64-65, 99 P. 502, 511-12 (1909).

78. CAL. CONST. art. X, § 2 (1976) (formerly CAL. CONST. of 1879 art. XIV, § 3 (1928)). The 1928 amendment provides:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adapt-

limit the right of a riparian owner, as against a subsequent appropriator, to the amount of water the riparian needed for reasonable and beneficial uses.[79]

California's dual system of water rights often led to conflicts between riparians and appropriators, which in turn led to the development of a system of priorities to determine the superior right.[80] The rule of priority developed since the 1928 amendment is that as between a riparian and an appropriator on the same watercourse who are both exercising a reasonable and beneficial use of water, the paramount right is the right that first came into existence.[81]

Before 1914, a right to an appropriation of water generally came into existence on the date water was first diverted and diligently applied to a beneficial use.[82] If, however, a pre-1914 appropriation of water was made in accordance with the 1872 Civil Code sections 1410-1422, priority of right vested from the time of posting notice of an intended appropriation, provided the actual appropriation for a beneficial use was diligently pursued.[83] In 1914, however, the California Water Commission Act[84] went into effect and established mandatory procedures for perfecting appropriative rights.[85] Under this Act, an ap-

able, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

79. Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 705, 22 P.2d 5, 16 (1933). The 1928 Amendment had the effect of reversing the *Pabst* and *Herminghaus* decisions discussed *supra* note 77.

Reasonableness of use generally refers to the method of use or method of diversion. CAL. WATER CODE § 100.5 (West Supp. 1982). *See also* Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal. 2d 489, 524-25, 45 P.2d 972, 986 (1935); Peabody v. City of Vallejo, 2 Cal. 2d 351, 367, 369, 40 P.2d 486, 491, 492 (1935). The beneficial nature of use refers to the purpose of the use. *See* CAL. WATER CODE § 1240 (West 1971). What constitutes a reasonable and beneficial use of water depends upon the facts and circumstances of each use. Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 140, 429 P.2d 889, 894, 60 Cal. Rptr. 377, 382 (1967); Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal. 2d 489, 524-25, 45 P.2d 972, 986 (1935).

80. *See* D. ANDERSON, *supra* note 1, at 46.

81. This rule is an extension of the earlier rule of priority. *See id.* at 48. The earliest cases recognized the rule of priority even where both the appropriator of water and the possessor of riparian land were trespassers on the public domain. Crandall v. Woods, 8 Cal. 143 (1857). *See* D. ANDERSON, *supra* note 1, at 46.

82. *See* D. ANDERSON, *supra* note 1, at 46.

83. CAL. CIV. CODE §§ 1410-1422 (West 1954). *See also* D. ANDERSON, *supra* note 1, at 46. Compliance with the 1872 Civil Code procedures concerning appropriations of water was optional.

84. Water Commission Act, 1913 Cal. Stat. ch. 586, at 1012.

85. *See* M. ARCHIBALD, *supra* note 63, at 9-12; *see also* D.Anderson, *supra* note 1, at 46.

propriator of water secures a priority of right as of the date of filing for a permit under the state Water Code,[86] provided the requirements for a valid appropriation are met.[87]

The date of inception of the riparian right traditionally has depended on when land transfers out of the public domain into private ownership.[88] Public domain lands are lands open to settlement, sale, or disposition under the public land laws.[89] For private landowners, the riparian right vests from the time of bona fide settlement of public domain lands with the intention of subsequently acquiring a complete title from the federal government by patent.[90] It is unsettled whether riparian rights attach to federal lands removed from the public domain by reservation or withdrawal, and if so, what the date of priority would be.[91] California courts have held that the riparian doctrine does not extend to federal lands.

California Case Law Concerning Riparian Rights on Federal Lands

The California courts have discussed the nature of the riparian right attaching to federal lands in California in a series of cases.[92] In a 1914 case, *Palmer v. Railroad Commission*,[93] the California Supreme Court stated that riparian rights did attach to lands of the United States, but that by the Act of 1866 the United States had consented to the diversion of water by subsequent appropriators and the establishment of rights superior to the federal government's riparian right.[94] The question before the court was whether the waters at issue had been dedicated to public use.[95] The court held that the facts presented in

86. CAL. WATER CODE § 1450 (West 1971). *See also* D.ANDERSON, *supra* note 1, at 46.

87. For a discussion of the requirement for a valid appropriation, see M. ARCHIBALD, *supra* note 63, at 15-31.

88. McKinley Bros. v. McCauley, 215 Cal. 229, 231, 9 P.2d 298, 299 (1932). *See also* W. HUTCHINS, *supra* note 1, at 179-80.

89. *See supra* note 49.

90. Pabst v. Finmand, 190 Cal. 124, 131, 211 P. 11, 14 (1922). *See also* W. HUTCHINS, *supra* note 1, at 181. Patent is defined *supra* note 35.

91. This issue is the primary focus of this Comment and will be analyzed in detail *infra* notes 117-30 & accompanying text.

92. As discussed above, water rights on federal lands, other than federal reserved rights, must be acquired pursuant to state law. *See supra* notes 33-52 & accompanying text. Therefore, in the following discussion and analysis of the nature of riparian rights on federal lands in California, the applicable law is California state law.

93. 167 Cal. 163, 138 P. 997 (1914).

94. *Id.* at 168-69, 138 P. at 999. *See also* Lux v. Haggin, 69 Cal. 255, 339-40, 10 P. 674, 721-22 (1886).

95. Palmer v. Railroad Comm'n, 167 Cal. at 167, 138 P. at 998. The plaintiff's theory was that the designation of places of intended use constituted a dedication of the waters claimed in the notice to public use for the benefit of all the territory embraced in the designated places. *Id.*

Palmer did not constitute a dedication of water to public use.[96] The actual holding is not relevant to the present discussion; in support of its conclusion, however, the court ruled that there was no public right to water and that the only right attaching to water in running streams was vested entirely in the several riparian owners along its course.[97] In outlining how riparian rights came to attach to private lands, the court stated:

> The United States, with respect to the lands which it owns in this state, is a riparian proprietor as to the streams running through such lands. It is only by virtue of that fact that it has any right or power of disposition over the waters thereof. And its right and power in that respect is no greater and no less than that of any other riparian proprietor. By the act of July 26, 1866 (14 U.S. Stats. 251), the United States consented that private persons might acquire rights to water flowing in streams through its lands by taking possession thereof, that is, by diverting the same, in such manner as should be provided by the laws of the particular state. Where such diversion had not been made, a grant of its lands by the United States to a private person without reservation, would carry with it the riparian rights pertaining to that land in streams flowing through it, in the same manner as in the case of a grant of land by a private owner.[98]

Thus, the court in *Palmer* adopted the theory that Congress consented by the Act of 1866 to allow subsequent appropriators to obtain rights superior to the government's otherwise paramount riparian right on federal lands.[99]

In 1922, the California Court of Appeal in *Rindge v. Crags Land Co.*[100] addressed the attachment of riparian rights to federal lands in California. The controversy before the court involved a downstream appropriator who was asserting that her appropriative water rights to a particular stream were superior to a competing upstream riparian right on the same stream.[101] In order to determine which right was superior, the court had to determine the date of inception of the riparian right. In making this determination, the court ruled that "[a]s to land held by the government it is not considered that a riparian right has attached until that land has been transmitted to private ownership . . . ."[102]

In support of its holding in *Rindge*, the court relied on *Duckworth v. Watsonville Water & Light Co.*[103] in which the California Supreme

96. *Id.* at 167-69, 138 P. at 998-99.

97. *Id.*

98. *Id.* 168-69, 138 P. at 999. This discussion in *Palmer* concerning the riparian rights of the United States can be regarded as a dictum: the rights of the United States were not at issue and the discussion was not essential to the holding of the case.

99. *See* W. HUTCHINS, *supra* note 1, at 204.

100. 56 Cal. App. 247, 205 P. 36 (1922).

101. *Id.* at 251-52, 205 P. at 38.

102. Rindge v. Crags Land Co., 56 Cal. App. at 252, 205 P. at 38.

103. 150 Cal. 520, 89 P. 338 (1907).

Court considered the effect of an appropriation on preexisting water rights.[104] The *Duckworth* court concluded that the preexisting rights affected by an appropriation included the riparian rights attaching to public lands of the United States, "*solely* because the act of Congress declares that grants of public lands shall be made subject to all water rights that may have previously accrued to any person other than the grantee."[105] The "act of Congress" to which *Duckworth* referred were the Acts of 1866, 1870, and 1877.[106]

While the *Palmer* court focused on the *consent* of the federal government, the *Rindge* conclusion that riparian rights simply do not attach to federal lands until they are transferred to private ownership[107] is based, in reliance on *Duckworth*, on the Acts of 1866, 1870, and 1877. Although *Palmer* and *Rindge* state the rule differently,[108] both decisions are based on the effect of the same acts of Congress on water rights held by the United States.[109]

In *McKinley Bros. v. McCauley*,[110] decided in 1932, the California Supreme Court again discussed the issue of riparian rights on federal lands within the state. *McKinley Bros.* involved a conflict between a competing appropriator and a riparian. In order to determine the superior right, it was necessary for the court to determine the date upon which the riparian right vested.[111] The court held that the patent under which the riparian claimed, being subsequent in point of time to the competing appropriation, was inferior to the appropriative right, "for it is settled that riparian rights do not attach to lands held by the government until such land has been transmitted to private ownership."[112] The court in *McKinley Bros.* cited *Rindge* and *San Joaquin & Kings*

104. *Id.* at 530-31, 89 P. at 343.

105. *Id.* at 531, 89 P. at 343 (emphasis added).

106. *See* W. HUTCHINS, *supra* note 1, at 56.

107. Although *Rindge* was decided eight years after *Palmer*, the court in *Rindge* did not cite to or mention the *Palmer* decision.

108. *Palmer* stated that riparian rights held by the United States are inferior to subsequent appropriations because Congress so consented. *See supra* note 98 & accompanying text. *Rindge*, on the other hand, found subsequent appropriative rights superior because no riparian right attaches to land held by the federal government. *See supra* note 102 & accompanying text.

109. *See* W. HUTCHINS, *supra* note 1, at 56, 180; *see also* San Joaquin & Kings River Canal & Irrigation Co. v. Worswick, 187 Cal. 674, 203 P. 999 (1922), in which the court, in explaining why the rights of an appropriator were superior to riparian rights of a purchaser of land from the United States lying above the point of diversion, stated that the reason "must be based on the hypothesis that the reservation provided for by section 17 of the act of 1870 in favor of accrued and vested rights runs to the appropriator of water upon land of the United States and creates in him a right superior to that of the riparian right of the United States . . . ." *Id.* at 685-86, 203 P. at 1004.

110. 215 Cal. 229, 9 P.2d 298 (1932).

111. *Id.* at 230-31, 9 P.2d at 299.

112. *Id.* at 231, 9 P.2d at 299.

River Canal & Irrigation Co. v. Worswick[113] in support of this rule. Both *Rindge* and *Worswick* were based on the theory that the Acts of 1866, 1870, and 1877 allowed appropriators to obtain rights superior to the preexisting riparian rights of the federal government.[114]

Although stated differently,[115] the basis for all the California cases cited above is the same: By the Acts of 1866, 1870, and 1877, Congress consented to appropriators on federal lands obtaining rights superior to the riparian rights of the federal government. Were it not for these Acts of Congress, the riparian rights of the federal government would be superior to subsequent appropriative rights.[116]

New Approach: Riparian Rights on Federal Withdrawn or Reserved Lands in California

Although the California courts have established the rule that no riparian right attaches to federal land until such land has transferred to private ownership, these same courts have failed to consider whether this rule is applicable to federal lands which have been withdrawn or reserved from the public domain. Reserved lands are lands removed from the public domain and immediately dedicated to a predetermined purpose.[117] Withdrawn lands are lands removed from the public domain for the purpose of maintaining the status quo while the ultimate dispostition of the land is being determined.[118]

In the *Pelton Dam* case, discussed above, the United States Supreme Court held that the Acts of 1866, 1870, and 1877 were not applicable to lands reserved from the public domain.[119] The Court,

113. 187 Cal. 674, 203 P. 999 (1922). *See supra* note 109.

114. *See supra* notes 103-09 & accompanying text.

115. *Compare Palmer*, *supra* text accompanying note 98, *with Rindge* and *McKinley Bros.*, *supra* text accompanying notes 102, 112.

116. Hutchins' treatise on California water rights law supports this conclusion:

> By the Congressional legislation of 1866, 1870 and 1877 the United States formally consented to the acquirement of appropriative rights on the public domain and thereby waived its right to object to the impairment of the rights of its public lands in the use of the nonnavigable streams flowing through them . . . .
>
> It is settled, said the Supreme Court in 1932, "that riparian rights do not attach to lands held by the government until such land has been transmitted to private ownership." So long as lands remain in government ownership, riparian rights are not asserted as against intending appropriators, because the United States expressly consented to the acquirement of appropriative rights on the public domain and thereby waived its rights to object to the impairment of the water rights of its public lands by reason of the acquirement of rights by intending appropriators under State and Territorial laws.

W. HUTCHINS, *supra* note 1, at 56, 180 (footnotes omitted).

117. *See supra* note 7.

118. *See supra* note 7.

119. *See supra* notes 45-52 & accompanying text.

however, blurred the distinction between reservations and withdrawals in holding that Acts were inapplicable to "lands which are not unqualifiedly subject to sale and disposition."[120] The nature of withdrawals and reservations is such that both are lands "not unqualifiedly subject to sale and dispostition."[121] Therefore, under the rationale used by the Court in *Pelton Dam*, the Acts of 1866, 1870, and 1877 are inapplicable to *both* withdrawals and reservations. Moreover, when the Court discussed reservations under the Federal Power Act, it referred to reservations as lands not subject to private appropriation and disposal under public land laws.[122] Neither withdrawals nor reservations are subject to appropriation and disposal under the public land laws.[123] Thus, although the language used in the opinion mentions "reserved lands" and "reservations," the rationale behind the finding of nonapplicability of the subject acts applies to *all* lands withdrawn from operation of the public land laws.

The *McKinley Bros.* rule [124] in California is based on the California Supreme Court's interpretation of the Acts of 1866, 1870, and 1877.[125] In the California cases developing this rule, however, no distinction has been made as to the types of federal lands to which the rule applied. The *McKinley Bros.* rule is purportedly applicable to all "lands held by the government."[126] *Pelton Dam* indicates, however, that the status of federal lands is dispositive. If the federal lands in question are within the public domain, the Acts are applicable; if the lands are no longer in the public domain, then the Acts are inapplicable. Because the basis of the *McKinley Bros.* rule rests on the Acts of 1866, 1870, and 1877, and because *Pelton Dam* holds that these Acts do not apply to reserved or withdrawn lands, it follows that the *McKinley Bros.* rule is not applicable to reserved or withdrawn lands.

This conclusion is supported by the theory of congressional consent.[127] When Congress, by reservation or withdrawal, removes lands from the operation of the Acts of 1866, 1870, and 1877, it thereby removes its consent to allowing appropriative rights to be acquired paramount to the riparian rights of the federal government. Without con-

120. Federal Power Comm'n v. Oregon, 349 U.S. 435, 448 (1955).

121. *See supra* note 7; *see also* C. WHEATLEY, *supra* note 7, at A-1.

122. Federal Power Comm'n v. Oregon, 349 U.S. at 443-44.

123. *See supra* note 7.

124. For convenience, the "settled" doctrine in California that riparian rights do not attach to federal lands until they transfer to private ownership will be referred to as the "*McKinley Bros.* rule."

125. *See supra* notes 98-116 & accompanying text.

126. McKinley Bros. v. McCauley, 215 Cal. 229, 231, 9 P.2d 298, 299 (1932).

127. *See supra* notes 99-116 & accompanying text. In brief, the theory is that the California rule that no riparian rights attach to federal lands until such lands pass to private ownership is based solely on the consent of Congress granted by the Acts 1866, 1870, and 1877.

gressional consent in this situation, the United States is in a position to reassert its riparian rights.[128]

Absent the *McKinley Bros.* rule and the consent granted by Congress, the federal government is vested with the same water rights as other landowners in California owning lands abutting a watercourse; consequently, the federal government possesses riparian water rights under California law as to riparian lands withdrawn or reserved from the public domain.[129] In effect, riparian rights in the federal government have a date of priority as of the date of reservation or withdrawal.

The foregoing analysis leads to the following conclusions: 1) riparian rights attach to all federal riparian lands in California; however, by the Acts of 1866, 1870 and 1877, Congress consented to allowing appropriators to acquire rights superior to the government's riparian rights; 2) by reserving or withdrawing these lands from the public domain, they are removed from the operation of the Acts of 1866, 1870 and 1877, thereby withdrawing the consent of Congress; and 3) upon a withdrawal or reservation of federal lands, the United States is in a position to object to impairment of its riparian rights by appropriative rights vesting after the date of the withdrawal or reservation.[130]

128. *See* W. HUTCHINS, *supra* note 1, at 56, 180, 104. If the Acts of 1866, 1870, and 1877 are viewed as a waiver of the right of the United States to object to the impairment of the water rights on its public lands, then removal of lands from the operation of those Acts necessarily withdraws the waiver; consequently, upon withdrawal of the waiver, either by reservation or withdrawal of lands from the public domain, the United States is again in a position to object to the impairment of its water rights after the date of the reservation or withdrawal.

129. *See generally* Note, *Federal-State Conflicts Over the Control of Western Waters*, 60 COLUM. L. REV. 967, 992-93 (1960) (in a state which adopted the riparian rights doctrine (*e.g.*, California), "the federal government could not by subsequent withdrawal of waters from the [Desert Land Act of 1877] reassert control over these waters under the property power except to the extent that it still owned riparian lands to which riparian rights under state law attached.").

130. The Ninth Circuit Court of Appeals has not answered directly the question of whether riparian rights attach to withdrawn or reserved lands in California. In United States v. Central Stockholders' Corp., 52 F.2d 322 (9th Cir. 1931), the riparian rights of the United States were discussed but not decided. The district court opinion in this case stated that "[p]lainly, the United States can have no different or superior right as a riparian proprietor to that assigned to private ownership." United States v. Central Stockholders' Corp., 43 F.2d 977, 980 (S.D. Cal. 1930). On appeal, however, the Ninth Circuit never reached the issue of whether riparian rights attached to the federal lands in question. *See* W. HUTCHINS, *supra* note 1, at 204-05.

In a case concerning the water rights of the United States at Camp Pendleton, California, the Ninth Circuit readily recognized the federal government as possessing riparian rights in *acquired lands* (*i.e.*, those acquired from non-federal owners by purchase, condemnation, gift or exchange). California v. United States, 235 F.2d 647, 656 (9th Cir. 1956). The court did not address the issue of riparian rights on withdrawn or reserved lands.

Although the federal courts have not ruled on whether riparian rights attach to reservations and withdrawals in California, it is interesting to note statements in briefs filed by the United States in California *ex rel.* State Lands Comm'n v. United States, Civ. No. S-80-676-

The conclusions in favor of a riparian right held by the federal government are applicable to the situation at Mono Lake. If the government were to successfully assert a riparian right, then some of the problems caused by excessive diversions of water out of the basin could be alleviated.[131]

The Mono Lake Controversy: Assertion of Riparian Rights Held by the United States

Background of the Mono Lake Controversy

Mono Lake is located in Mono County, California, about 340 miles north of Los Angeles, and covers approximately 60 square miles.[132] The lake is fed by annual spring and summer runoffs from

LKK (E.D. Cal. filed Aug. 8, 1980), a case concerning withdrawn lands in California. In a memorandum filed with the district court, the United States argued that "the adoption of state law in this case, as the state has argued, would result in the loss of valuable riparian rights [of the United States] . . . . This would . . . cut off the United States' riparian status with respect to water rights . . . ." Memorandum of Law in Support of Defendant's Motion for Partial Summary Judgment and in Opposition to Plaintiff's Motion for Partial Summary Judgment at 10 n.5, California *ex rel.* State Lands Comm'n v. United States, Civ. No. S-80-676-LKK (E.D. Cal. filed Aug. 8, 1980). In another memorandum filed with the court, the United States asserts it "has a certain valuable right based upon its current riparian status." Final Memorandum of Law in Support of Defendant's Motion for Partial Summary Judgment and in Opposition to Plaintiff's Motion for Partial Summary Judgment at 6 n.5, California *ex rel.* State Lands Comm'n v. United States, Civ. No. S-80-676-LKK (E.D. Cal. filed Aug. 8, 1980). Although the claims of the United States are not dispositive of any legal issues, the fact that the United States assumes it possesses riparian rights in its withdrawn lands in California supports the general conclusion that the United States can assert riparian rights in its withdrawn and reserved lands.

131. Another matter in which riparian rights are being asserted by the United States to protect instream flows is the Hallet Creek Adjudication currently before the State Water Resources Control Board of California. *See supra* note *. In this case, the United States Forest Service claims riparian rights with respect to certain national forest service lands which were removed from the public domain by reservation. *See* Brief of the United States at 7, Hallett Creek Adjudication, Lassen County, State Water Resources Control Bd. of the State of Cal. (filed Oct. 26, 1982). The United States claims its riparian rights on these lands exist "subject to whatever appropriative rights were perfected while said lands were in the public domain *prior* to such reservation therefrom, and which have not since been lost by the appropriator." *Id.* (emphasis added). This theory is not inconsistent with the theory of this Comment as applied to the Mono Lake situation. The date of inception of Los Angeles' appropriative rights in the Mono Basin was 1934, three years *after* the lands were withdrawn from the public domain. *See infra* notes 136-37 & accompanying text. Thus the federal government's riparian right is superior to the subsequent appropriation by Los Angeles. *See infra* notes 147-52 & accompanying text.

132. INTERAGENCY REPORT, *supra* note 4, at 11. The magnificence and beauty of the Mono Basin has been aptly described by Israel Russel, a pioneer geologist:

> [H]ere rests upon the desert plain what appears to be a wide sheet of burnished metal, so brilliant and even is its surface. It is Lake Mono. At times the waters reflect the mountains beyond with strange distinctness . . . . No prosaic description can portray the grandeur of fifty miles of rugged mountains rising beyond a

the Sierra Nevada Mountains that rise to the west of the Mono Basin.[133] Since the lake has no natural outlet, its waters are salty and alkaline.[134]

The City of Los Angeles first considered the feasibility of diverting water from the Mono Basin in 1920.[135] In 1931, the federal lands surrounding Mono Lake were withdrawn from the public domain.[136] In 1934, Los Angeles applied to the state for the water rights to appropriate water from the feeder streams to Mono Lake and, in the same year, began construction of water diversion facilities.[137] In 1940, the project was complete and permits to appropriate water from the Mono Basin were issued to Los Angeles.[138] Diversions commenced in 1941.[139] In 1970, Los Angeles began operating a second aqueduct which nearly doubled the amount of water being diverted from Mono Basin and drastically reduced releases into Mono Lake.[140]

Los Angeles' diversions of water from Mono Basin have had acute effects on the level of Mono Lake. Between 1941 and January 1983, the lake's elevation dropped forty-six feet.[141] As indicated in the summary of the Report of the Interagency Task Force on Mono Lake, the effects of the drop are significant:

> Major concerns emerging as the lake level drops are degradation of air quality, threats to the major California gull nesting site and other migratory birds which migrate through the area, loss of brine shrimp, brine flies, and brine fly larvae, which are important as a food source for the birds, and adverse effect on scenic values.[142]

After identifying and noting the severity of these problems, the Interagency Task Force recommended an immediate eighty-five percent re-

placid lake in which each sharply cut peak, each shadowy precipice, and each purple gorge is reflected.

Id. at 23.

133. *Id.* at 11.

134. *Id.* at 15.

135. *Id.* at 12.

136. *See infra* note 151 & accompanying text.

137. INTERAGENCY REPORT, *supra* note 4, at 12-13.

138. *Id.* at 13. In 1974, the State Water Resources Control Board issued the City of Los Angeles a permanent license to divert water from the Mono Basin. *Id.*

139. *Id.*

140. *Id.*

141. In 1941, the lake's elevation was about 6,418 feet. *Id.* at 15. As of January 1983, the lake's elevation was 6,372 feet. MONO LAKE COMM. NEWSLETTER, Winter 1983, at 3.

142. INTERAGENCY REPORT, *supra* note 4, at 1. For a more specific discussion of the problems plaguing Mono Lake, see *id.* at 15-24. The Interagency Task Force was created in 1978 by the California Department of Water Resources to develop alternative solutions and recommend a plan for protecting the natural resources in Mono Basin. The members of the Task Force were appointed by the State Departments of Water Resources and Fish and Game, the U.S. Bureau of Land Management, the U.S. Forest Service, the U.S. Fish and Wildlife Service, Mono County, and the Los Angeles Department of Water and Power. *Id.* at iii.

duction in Los Angeles' export of water from the Mono Basin.[143] The recommendations of the Task Force, however, have not been followed, and in April 1980 the Sierra Club and Natural Resources Defense Council filed suit asserting, among other claims, a riparian right in the federal government to maintain the level of the lake.[144]

Federal Government's Riparian Rights to Protect Instream Uses at Mono Lake

Because the federal government owns the majority of land bordering Mono Lake,[145] a successful assertion of a riparian right could prevent or limit further diversions out of the basin and protect instream uses.[146] In order to determine whether the federal government's riparian right can be asserted to control diversions out of Mono Basin, three issues must be considered: 1) whether the federal government can assert a riparian right in its withdrawn lands against Los Angeles' appropriative right; 2) whether the federal government's riparian use to maintain the level of the lake is reasonable and beneficial as compared with Los Angeles' appropriations for domestic use; and 3) what remedy is available to the federal government.

Status of the Federal Government's Riparian Right

In 1931, Congress withdrew the federal lands bordering Mono Lake and its feeder streams from the public domain for the purposes of protecting the watershed supplying water to Los Angeles and for protecting recreational and grazing purposes in the Mono Basin.[147] By withdrawing these lands, Congress withdrew its consent to allowing ap-

143. *See id.* at 45, 55.

144. Sierra Club v. United States, Civ. No. S-80-282-LKK (E.D. Cal. filed Apr. 17, 1980).

145. *See* INTERAGENCY REPORT, *supra* note 4, at 42-43.

146. An instream use of water is a nonconsumptive use; water is not confined or diverted, but is allowed to remain in the watercourse. GOVERNOR'S COMM'N TO REVIEW CAL. WATER RIGHTS LAW, FINAL REPORT 99 (1978) [hereinafter cited as FINAL REPORT]. Instream uses include recreational uses, fish and wildlife protection, aesthetic and leisure enjoyment, and scientific study. *Id.*

147. Act of March 4, 1931, ch. 517, 46 Stat. 1530 (1931). The title to the 1931 Act describes the Act as "[w]ithdrawing certain public lands . . . for the protection of the watershed . . . *and for other purposes*." *Id.* (emphasis added). The purposes of the Act, other than watershed protection, include protection of recreational and grazing purposes. *Id.* The 1931 Act provides in relevant part:

> The following described public lands are hereby withdrawn from settlement, location, filing, entry or disposal under the land laws of the United States for the purpose of protecting the watersheds now or hereafter supplying water to the city of Los Angeles and other cities and towns in the State of California . . . .
>
> . . . .
>
> . . . And provided further, that nothing contained herein shall be construed as affecting the use or occupation of any said withdrawn lands for recreational or

propriative rights to vest superior to the riparian rights held by the federal government.[148] After the date of withdrawal, the federal government's riparian rights were no longer subject to the consent granted by Congress. Subsequent to this date, therefore, the United States could assert riparian rights in its withdrawn lands and object to appropriative rights vesting after the date of withdrawal.[149]

In analyzing whether the riparian rights held by the federal government at Mono Lake are superior to Los Angeles' appropriative right, the relative dates of the inception of the respective rights are determinative.[150] As established above, the superior right is the right with the earlier date of inception.[151] Thus, the federal government can assert its riparian right against appropriative rights vesting after 1931, the date of the withdrawal at Mono Lake. The date of inception of Los Angeles' appropriative right is 1934, when Los Angeles applied to the state for a permit to appropriate water.[152] Since the federal government's riparian right predates Los Angeles' appropriative right by three years, the riparian right of the federal government is paramount.

Reasonable and Beneficial Use

Although the United States may hold a superior right, its use of water is limited by the California Constitution to the amount needed

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grazing purposes under such rules and regulations as the Secretary of Interior may deem necessary to conserve the national forage resources of the area.

Id. at 1530, 1548.

It is important to note a crucial distinction between riparian rights and federal reserved rights. The existence and extent of a federal reserved right depends on the *purpose* for the reservation. *See supra* note 49. A riparian right, however, is not dependent on the purpose of the reservation or withdrawal, but is an attribute of ownership of riparian lands. *See* W. HUTCHINS, *supra* note 1, at 40, 179. The withdrawal or reservation of federal lands in the context of riparian rights is important only because the mere act of removing land from the public domain operates to remove the consent of Congress and thereby allow for an assertion of riparian rights. The purpose of the particular withdrawal or reservation is irrelevant.

148. *See supra* notes 134-38 & accompanying text. Although it may seem anomalous that legislation enacted to protect the watershed for Los Angeles can be asserted as the basis for riparian rights held by the government which may limit Los Angeles' appropriations, such a result is consistent with the intent of the Act. Congress withdrew its lands around Mono Basin for the purpose of protecting the watershed and also for grazing and recreational purposes. The language of the statute indicates that the 1931 withdrawal was multipurpose and that Congress intended to protect the natural values in the Mono Basin in addition to protecting the watershed. Congress did not authorize Los Angeles to destroy the watershed and do away with grazing and recreation uses therein. The 1931 Act was an explicit recognition by Congress that grazing and recreational uses in the Mono Basin were not to be affected by Los Angeles' diversions of water out of the basin.

149. *See supra* notes 128-29 & accompanying text.

150. *See supra* notes 81-82 & accompanying text.

151. *See supra* notes 81-82 & accompanying text.

152. *See supra* note 137 & accompanying text.

for reasonable and beneficial uses.[153] Thus, in order for the federal government to assert its paramount riparian right against Los Angeles, its use of water to maintain the level of Mono Lake must be reasonable and beneficial when compared to the appropriations by Los Angeles for domestic use.[154] A use of water is beneficial if the use serves a beneficial purpose.[155] The question of whether a use of water is reasonable, however, focuses on the method of use and/or diversion rather than on the purpose of the use.[156] A use of water is reasonable if, under all the circumstances of the case, a particular use by one proprietor is reasonable and consistent with the corresponding enjoyment of competing uses.[157]

The California Water Code provides that certain uses of water are beneficial.[158] Section 1243 declares that the "use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water."[159] The primary purpose for an assertion of a riparian right by the United States to maintain the level of Mono Lake would be to protect the recreational uses and the fish and wildlife found there. Thus, the riparian use at issue has already been declared to be beneficial as a matter of legislative policy.

In addition to the Water Code sections regarding beneficial uses of water, the Code also establishes statewide policies concerning the use of water in California.[160] Section 106 provides that "use of water for domestic purposes is the highest use of water."[161] Although, by this

153. *See supra* notes 78-79 & accompanying text.

154. *Id.*

155. Peabody v. City of Vallejo, 2 Cal. 2d 351, 369, 40 P.2d 486, 492 (1935).

156. *Id. But see* Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 140, 429 P.2d 889, 894, 60 Cal. Rptr. 377, 382 (1967) ("what is a reasonable use . . . is a question of fact to be determined according to the circumstances in each particular case").

157. Prather v. Hoberg, 24 Cal. 2d 549, 562, 150 P.2d 405, 412 (1944). *See also* W. HUTCHINS, *supra* note 1, at 228.

158. *See* CAL. WATER CODE §§ 1240-1243.5 (West 1971).

159. CAL. WATER CODE § 1243 (West Supp. 1982). The California Administrative Code contains the following relevant definitions:

> Recreational use includes those uses, except the irrigation of golf course, which are common to a resort or other recreational establishment such as boating, swimming, and fishing, and may include water which is appropriate by storage and either retained in the reservoir or released downstream to support these purposes. Use of water at a camp ground or resort for human consumption, cooking or sanitary purposes shall be considered a domestic use.

CAL. ADMIN. CODE tit. 23, R. 667 (1979). "Fish and wildlife protection and enhancement uses include water which is appropriated by storage and either retained in the reservoir or released downstream to support these purposes." *Id.* tit. 23, R. 667.5.

160. *See* CAL. WATER CODE §§ 100-108 (West 1971).

161. *Id.* § 106. Domestic uses are defined as follows:

> Those common to homes, resorts, motels, organization camps, camp grounds, etc., including the incidental watering of domestic stock for family sustenance and the irrigation of not to exceed one-half acre in lawn, ornamental shrubbery, gardens

section, Los Angeles' appropriations from Mono Lake are deemed to be the highest use of water, other legislative declarations offer contrasting policies. Specifically, the Water Code provides that water use shall be in furtherance of the public interest and public benefit and shall be controlled for public protection.[162] When the supply of water is limited, public interest requires that it be put to the greatest number of beneficial uses which the supply can yield.[163]

Concerning the issue of whether maintenance of a lake's level is reasonable and beneficial, Professor Hutchins states:

> [T]he maintenance of the level of a lake in its natural condition, with all of its attractive surroundings, has been held to be a reasonable beneficial use of the water under the constitutional amendment of 1928, and a part of the littoral rights of the bordering lands. This was held to be the case with respect to two lakes—Mono Lake and Lake Elsinore—the community interest in each case being considerable. Thus, even though the water of Mono Lake is so high in salt content as to render it unfit for human consumption or domestic use, the existence of the lake is the vital thing that furnishes to the marginal land almost its entire value . . . .[164]

The cases referred to by Hutchins are *City of Los Angeles v. Aitken*[165] and *City of Elsinore v. Temescal Water Co.*[166] In *Aitken*, Los Angeles brought a condemnation action against the private riparian owners at Mono Lake.[167] In determining whether the private riparians' use of Mono Lake was reasonable and beneficial, the court held that "their use of the lake in its natural condition is reasonable beneficial to their land, and the littoral rights thereof may therefore not be appropriated, even for a higher or more beneficial use for public welfare, without just compensation therefore."[168] In *Temescal Water Co.*, a contract dispute existed between the defendant water company, which was appropriating water for irrigation purpose, and the city, which was asserting its

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> and truck at any single establishment. Use of water at a camp ground or resort for human consumption, cooking or sanitary purposes shall be considered a domestic use.

CAL. ADMIN. CODE tit. 23, R. 661 (1979).

162. *See* CAL. WATER CODE §§ 104-105 (West 1971).

163. City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 925, 207 P.2d 17, 28 (1949), *cert. denied*, 339 U.S. 937 (1950); Peabody v. City of Vallejo, 2 Cal. 2d 351, 368, 40 P.2d 486, 492 (1935).

164. W. HUTCHINS, *supra* note 1, at 245.

165. 10 Cal. App. 2d 460, 52 P.2d 585 (1935).

166. 36 Cal. App. 2d 116, 97 P.2d 274 (1939).

167. City of Los Angeles v. Aitken, 10 Cal. App. 2d at 462, 52 P.2d at 536. The federal government, although owning a majority of lands bordering Mono Lake, was not named as a defendant in the action.

168. *Id.* at 475, 52 P.2d at 592.

rights to protect the recreational uses of Lake Elsinore.[169] In response to the water company's assertion that allowing water to flow into and remain in the lake was waste, an unreasonable use of water, and against public policy, the court held:

> [T]he argument . . . is without merit. Neither the maintenance of health-giving recreational opportunities, nor the existence and continuance of large business interests devoted to and built up for the purpose of making those opportunities available to large numbers of its citizens, can be held to be against the public policy of this state.[170]

California Water Code section 1243, *Aitken*, and *Temescal Water Co.* establish that maintenance of the level of a lake to protect recreation, fish and wildlife uses is, at a minimum, a beneficial use of water. Moreover, *Aitken* is similar to the present case in that it held the private riparians' use of water at Mono Lake to be reasonable *and* beneficial even though the court recognized that competing appropriative use were for a "higher or more beneficial use for public welfare," that is, domestic use.[171]

A beneficial use of water, however, is not equated with a reasonable use.[172] A use of water must be *both* reasonable and beneficial.[173] Although *Aitken* and *Temescal Water Co.* establish that a riparian use of water for the purpose of maintaining the level of a lake in its natural condition can be reasonable and beneficial, the question of reasonableness depends on the circumstances of each case.[174] Reasonableness of use must be measured in light of competing uses.[175] In the Mono Lake controversy, there are competing beneficial uses: a riparian use to maintain the level of a lake to protect recreation, fish and wildlife, and an appropriative use for domestic purposes. When Los Angeles' use of

169. City of Elsinore v. Temescal Water Co., 36 Cal. App. 2d at 118-21, 97 P.2d at 274-77.

170. *Id.* at 129, 97 P.2d at 280.

171. City of Los Angeles v. Aitken, 10 Cal. App. 2d at 475, 52 P.2d at 592.

172. Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 139-143, 429 P.2d 889, 894-97, 60 Cal. Rptr. 377, 382 (1967).

173. *Id.*

174. *See id.* at 140, 429 P.2d at 894, 60 Cal. Rptr. at 382; *see also* W. HUTCHINS, *supra* note 1, at 228. *Compare Aitken* and *Temescal Water Co. with* Modoc Land & Stock Co. v. Booth, 102 Cal. 151, 156-57, 36 P. 431, 432-33 (1894) ("[I]n no case should a riparian owner be permitted to demand, as of right . . . [the restraint of diversions] from the stream at points above him, simply because he wishes to see the stream flow by or through his land undiminished and unobstructed . . . when the amount diverted would not be used by him, and *would cause no loss or injury to him or his land*, present or prosepctive . . . .") (emphasis added), *and* Rose v. Mesmer, 142 Cal. 322, 330, 75 P. 905, 908 (1904) (a riparian owner has no right "to insist on the full flow of the stream over his land for the mere pleasure of looking at it as a feature of the landscape."). *Booth* and *Mesmer* are distinguishable from the present situation at Mono Lake in that the severe environmental consequence at issue at Mono Lake were not present in the former cases.

175. *See supra* note 157 & accompanying text.

Mono Lake water is considered in light of the riparian uses to protect recreation, fish, and wildlife and to prevent further environmental degradation in the Mono Basin, it is difficult to determine which use best satisfies the public interest, public benefit or public protection criteria of the Water Code. Given this difficulty, it cannot be conclusively determined from the varying policy statements contained in the Water Code whether a riparian use to maintain a lake's level is more or less reasonable than an appropriation for domestic use.

Given the diminishing supply of water in the Mono Basin,[176] it is unreasonable for Los Angeles to exercise its appropriative right by diverting all the water from the basin to the total exclusion of the instream uses. Conversely, if the United States were to assert its riparian right and demand that the full flow of the feeder streams be allowed to flow into Mono Lake to protect instream uses without allowing any diversions out of the basin, this would also be unreasonable. The law requires that the greatest number of beneficial uses be accommodated.[177] Since the reasonableness required by the 1928 constitutional amendment suggests that there be a middle ground between the competing beneficial uses,[178] a rational approach at Mono Lake would be to allow both the riparian and appropriative uses to coexist to the greatest extent possible.[179] A portion of the limited supply of water flowing into the Mono Basin should be allowed to flow into the lake to maintain instream uses. The remaining portion should be diverted out of the basin to supply the domestic needs in Los Angeles. Any alternative favoring one use of water over the other, is unreasonable, and therefore, constitutionally impermissible.

Remedy Available to the United States for Infringement of Its Riparian Right at Mono Lake

Under the 1928 constitutional amendment requiring water use to be reasonable and beneficial, a downstream riparian (the federal government) is not entitled to any remedy against an upstream appropriator (Los Angeles) unless the riparian can show substantial actual or prospective damage to the riparian right.[180] Because appropriations of water by Los Angeles out of the Mono Basin have caused the lake level

176. *See supra* note 141 & accompanying text.

177. *See supra* note 163 & accompanying text.

178. *See* D. ANDERSON, *supra* note 1, at 58-61 (discussing whether reasonableness as between a superior riparian owner and an inferior appropriator is absolute or relative). Some courts seem to balance the equities and desirability of competing uses, while others seem to adopt a *per se*, absolute rule. *Id.*

179. *See* FINAL REPORT, *supra* note 146, at 101.

180. *See* Moore v. California Oregon Power Co., 22 Cal. 2d 725, 738-39, 140 P.2d 798, 806 (1943) (damages only); Colorado Power Co. v. Pacific Gas & Elec. Co. 218 Cal. 559, 564, 24 P.2d 495, 497 (1933) (injunctive relief); *see also* W. HUTCHINS, *supra* note 1, at 276-78.

to drop substantially, resulting in severe damage to recreational, fish and wildlife resources,[181] and because preserving these resources is a proper riparian use of waters,[182] the requirement of substantial actual or prospective damage could be established. The extensive findings of the Interagency Task Force on Mono Lake,[183] tracing the environmental damage associated with the drop in the lake's level, should be sufficient to show substantial damage to the riparian right at Mono Lake.

There are generally three remedies available for a substantial infringement of riparian rights: damages, injunctive relief, or a physical solution.[184] A riparian owner such as the federal government whose riparian right is infringed on may always seek a remedy in damages.[185] Damages are measured by the difference in fair market value of the riparian land before and after the wrongful diversion.[186]

Injunctive relief is generally available for the infringement of a riparian right only when a public use has not attached to the competing appropriation.[187] A public use has attached to the competing appropriation when injunctive relief would seriously interfere with the service furnished by a public agency supplying water to the public.[188] Although the riparian is generally limited to the remedy of damages in inverse condemnation if a public use has attached,[189] the public use doctrine will not prohibit injunctive relief in all circumstances.[190]

Since diversions of water from the Mono Basin by the City of Los Angeles for use by the public qualifies as a public use, the federal government, as a competing riparian, would generally be relegated to a

181. *See* INTERAGENCY REPORT, *supra* note 4, at 16-24; *see also supra* notes 141-42 & accompanying text.

182. *See supra* notes 158-71 & accompanying text.

183. *See supra* note 142 & accompanying text.

184. For a general discussion of the remedies available for infringement of a riparian right in California, see W. HUTCHINS, *supra* note 1, at 276-82. A "physical solution" is discussed *infra* notes 199-201 & accompanying text.

185. *See* Colorado Power Co. v. Pacific Gas & Elec. Co., 218 Cal. 559, 564, 24 P.2d 495, 497 (1935); *see also* W. HUTCHINS, *supra* note 1, at 276-77.

186. W. HUTCHINS, *supra* note 1, at 277.

187. *See* Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal. 2d 489, 533, 45 P.2d 972, 990 (1935); Peabody v. City of Vallejo, 2 Cal. 2d 351, 374-75, 40 P.2d 486, 495 (1935); *see also* W. HUTCHINS, *supra* note 1, at 281.

188. *See* Cothran v. San Jose Water Works, 58 Cal. 2d 608, 614, 375 P.2d 449, 453, 25 Cal. Rptr. 569, 573 (1962).

189. Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal. 2d 489, 533, 45 P.2d 972, 990 (1932).

190. *See, e.g.*, City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 920, 207 P.2d 17, 25 (1949), *cert. denied*, 339 U.S. 937 (1950) (compensation in lieu of injunctive relief is preferred, but not required, when a public use has attached); Rank v. United States (Krug), 142 F. Supp. 1, 136 (S.D. Cal. 1956) (the California cases "do not present the doctrine of intervention of a public use as an absolute bar to injunctive relief, but rather indicate that prohibitory injunctive relief should be granted only if it appears that no other relief is adequate").

remedy of money damages. However, the general rule of the public use doctrine may not be applicable to the present case for two reasons. Property interests of the United States cannot be lost by inverse condemnation; and a remedy in damages is inadequate to compensate for the infringement of the riparian right at Mono Lake.

First, although successful assertion of the public use doctrine by an appropriator generally relegates the riparian to the sole remedy of inverse condemnation,[191] the property interests of the United States cannot be condemned absent the consent of Congress.[192] Since Congress has not consented to the condemnation of its water rights[193] at Mono Lake by Los Angeles, the public use doctrine (*i.e.*, inverse condemnation) is not applicable. If the property interests of the United cannot be taken in inverse condemnation, the United States should be entitled to injunctive relief to prevent the taking of its riparian water rights at Mono Lake.

Second, an award of damages would not be an adequate remedy to compensate for the injury to the federal government's riparian right. It is impossible to compensate for the environmental damage to the Mono Basin. Under the general doctrine of equity, the extraordinary remedy of a prohibitive injunctive should be granted if it appears that no other legal relief is adequate.[194] Thus, despite the public use doctrine, the United States should not be limited to damages, but should instead prevail in an action to obtain injunctive relief to prevent further diversions out of the basin.[195]

191. *See supra* note 189 & accompanying text.

192. *See* Alabama v. Texas, 347 U.S. 272, 273-74 (1953); Beaver v. United States, 350 F.2d 4, 8 (9th Cir.), *cert. denied*, 383 U.S. 937 (1966) (title to land owned by the United States can be divested only by Act of Congress); *see also* Utah Light & Power Co. v. United States, 243 U.S. 389, 404 (1916) (only through the exercise of Congress can rights in lands belonging to the United States be acquired).

193. The riparian right to use water is regarded and protected as property. Kidd v. Laird, 15 Cal. 162, 180 (1860); Fullerton v. State Water Resources Control Bd., 90 Cal. App. 3d 590, 598, 153 Cal. Rptr. 518, 526 (1979). A riparian "owns" a usufructory right to the reasonable use of water on his riparian land. Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 555, 81 P.2d 533, 560-61 (1938).

194. Hillside Water Co. v. City of Los Angeles, 10 Cal. 2d 677, 688, 76 P.2d 681, 687 (1938). *See also* Sheffet v. County of Los Angeles, 3 Cal. App. 3d 720, 737, 84 Cal. Rptr. 11, 18 (1970) ("[t]he appropriate course to pursue when such a [public] use has attached is to sue for damages in inverse condemnation, and unless the plaintiff can show good reason why such remedy would not be adequate, he is not entitled to an injunction where a public use has intervened").

195. Furthermore, the public use doctrine is not applicable in the present situation because of the theories used to support the doctrine. The public use doctrine is based on two theories: 1) waiver and estoppel; or 2) public policy. Hillside Water Co. v. City of Los Angeles, 10 Cal. 2d 677, 688, 76 P2.d 681, 687 (1938); Peabody v. City of Vallejo, 2 Cal. 2d 351, 378, 40 P.2d 486, 496-97 (1935). To the extent that the doctrine is based on a theory of waiver and estoppel, estoppel generally is not applied against the United States, especially where rights to public land are involved. *See* Union Oil Co. v. Morton, 512 F.2d 743, 748 n.

Although the federal government is entitled to damages for the infringement of its riparian right and may be entitled to injunctive relief against further appropriations by Los Angeles, the most appropriate remedy in this situation is not damages or an injunction, but rather a physical solution. Whereas an injunction would be granted primarily to prevent further wrongful diversions,[196] a physical solution, also within the equitable powers of the court, is a much more flexible remedy.[197] An equitable decree framing a physical solution can be enforced by injunctive order.[198]

The concept of a physical solution was adopted by the California Supreme Court in its interpretation of the 1928 constitutional amendment prohibiting the waste of water.[199] Hutchins states the doctrine of a physical solution as follows:

> It is now necessary in applying the constitutional amendment, to ascertain whether there exists a physical solution of the problem that will avoid waste and at the same time not unreasonably and adversely affect the vested property right of the paramount holder; and if no physical solution is suggested by the parties, it is the duty of the trial court to work one out independently of them.[200]

In fashioning physical solutions, courts have focused on how to best serve the public interest:

> This rule dictates that when the supply of water is limited . . . the public interest requires that there be the greatest number of beneficial users which the supply can yield. . . . "[I]t seems probable that the physical solution adopted by the trial court will promote the best interests of the public, because a *pro tanto* reduction of the amount of water devoted to each present use would normally be less

2 (9th Cir. 1975); Beaver v. United States, 350 F.2d 4, 8 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966). Concerning the public policy theory, there are two competing public policies regarding Mono Lake: maintaining the consumptive use of water versus maintaining the natural conditions in Mono Basin. Consequently, it is not clear what public policy rationale would support the public use doctrine in this case.

196. *See* 62 Cal. Jur. 3d *Water* §§ 459-60 (1981).

197. *Id.* § 465.

198. *See* W. HUTCHINS, *supra* note 1, at 354. The California Supreme Court has distinguished injunctions and physical solutions as follows:

> [T]he trial court should thoroughly investigate the possibility of some such physical solution, before granting an injunction that may be ruinous to either or both parties. It must be remembered that in this type of case the trial court is sitting as a court of equity, and as such, possesses broad powers to see that justice is done in the case.

Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 560-61, 81 P.2d 533, 562-63 (1938).

199. Peabody v. City of Vallejo, 2 Cal. 2d 351, 379-80, 383-84, 40 P.2d 486, 497, 498-99 (1935). *See also* W. HUTCHINS, *supra* note 1, at 281-82, 352.

200. W. HUTCHINS, *supra* note 1, at 281-82. *See also* City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 290, 537 P.2d 1250, 1316, 23 Cal. Rptr. 1, 67 (1975); Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 559-61, 81 P.2d 533, 562-63 (1938); City of Lodi v. East Bay Mun. Util. Dist., 7 Cal. 2d 316, 339-41, 60 P.2d 439, 449-51 (1936).

disruptive than total elimination of some of the uses."[201]

The conflict at Mono Lake is between two reasonable and beneficial uses of water, both in furtherance of the public interest. The limited supply of water flowing into Mono Lake is insufficient to meet the demands of all reasonable and beneficial uses. Hence, the most suitable remedy is a physical solution which accommodates both the riparian instream uses and the appropriative domestic uses. Assuming that a court established the paramount riparian right of the federal government at Mono Lake, the court and/or the parties should develop a physical solution which maintains instream flows sufficient to prevent further environmental damage and loss of instream uses at Mono Lake, but allows the excess flow to be diverted for domestic use in Los Angeles.[202]

Conclusion

The present water rights system in California favors offstream, consumptive uses of water and fails to adequately consider the beneficial uses which result from maintaining lake levels and instream flows.[203] As owner of a vast amount of lands in California, the federal government is in a unique position to prevent further environmental degradation resulting from excessive appropriations of water. By withdrawing or reserving federal lands in California from the public domain, Congress has removed its consent to allowing appropriative water rights to vest superior to the federal government's riparian rights on such lands. Thus, the government is in the position to reassert con-

201. California Water Serv. Co. v. Edward Sidebotham & Son, Inc., 224 Cal. App. 2d 715, 731-32, 37 Cal. Rptr. 1, 10-11 (1964), (quoting City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 933, 207 P.2d 17, 32-33 (1949), *cert. denied*, 339 U.S. 937 (1950)).

202. Factors to consider in shaping a physical solution to the problems at Mono Lake might include the following: the amount of water required to flow into the lake to protect recreation, fish and wildlife values; Los Angeles' need for the water; the feasibility of decreasing this need by water conservation and waste water reclamation; the relative costs imposed on the various parties; and the seasonal flows of water. For a discussion of four alternative plans for protecting the natural resources in Mono Basin, see INTERAGENCY REPORT, *supra* note 4, at 36-52.

The Governor's Commission to Review California Water Rights Law discussed the need to accommodate both instream and offstream use:

> The decline of instream values fairly speaks for itself. It, of course, is not enough to focus exclusively upon one area of need. The problem is that the available water supply must provide for a broad range of needs and interests, of which the protection of instream uses is but one. The solution to the problem of allocating water among instream and offstream beneficial uses requires the needs of all to be understood and weighed together and, where feasible to be reconciled and accommodated without unnecessarily sacrificing any one beneficial use of water.

FINAL REPORT, *supra* note 146, at 101.

203. FINAL REPORT, *supra* note 146, at 99-101, 105-08.

trol over its riparian rights under state law and to challenge appropriative rights vesting after the date of a withdrawal or reservation.

The failure to protect instream uses at Mono Lake has led to the deterioration of an important natural resource. As owner of the withdrawn lands bordering Mono Lake, the federal government can assert its riparian right and require—as mandated by the reasonableness measure in the 1928 amendment to the California Constitution—that competing beneficial uses be considered and provided for. An aggressive assertion by the United States of its riparian right to maintain the level of the lake and protect instream uses would help ensure an equitable resolution of the Mono Lake controversy.

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While this Comment was at press, the California State Water Resources Control Board (the Board) issued an order regarding the Hallet Creek Adjudication discussed *supra* note 131. *In re* Water of Hallet Creek Stream Sys. (Cal. State Water Resources Control Bd., Findings and Order of Determination, 1983). The United States Forest Service, using essentially the same analysis as has been presented in this Comment, *id.* at v-vii, argued that the federal government possessed riparian rights in its lands bordering Hallet Creek. *Id.* at v-xiv. The Board did not adopt this analysis, but rather applied the literal rule of *McKinley Bros.* and other cases discussed *supra* notes 93-118 & accompanying text. The Board failed to recognize the importance of the *Pelton Dam* case, *In re* Water of Hallet Creek Stream Sys., *supra*, at vi-viii, ix, and relied on the policy of promoting certainty in water rights. *id.* at ix-xiv. The conclusion reached by the Board was that the federal government did *hold* riparian rights in the Hallet Creek watershed.

The United States will seek judicial review of these findings in the state superior court. That court will analyze the legal issues and be able to consider the theory outlined in this Comment.